**B.C.D. 04-54** **NOV 15 2004**

## Employee Service Determination

GT
TO

This is the decision of a majority of the Railroad Retirement Board regarding whether the services performed by GT and TO for CSX Transportation constituted employee service under the Railroad Retirement Act (45 U.S.C. § 231 et seq.(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA). CSXT is a covered employer under those Acts.

GT is currently receiving an annuity under the Railroad Retirement Act with an annuity beginning date of November 1, 2003. He stated that he is a former Conrail employee who "was asked to be available to answer questions re territory acquired by CSX and to coach a senior CSX executive re sales and marketing techniques. This individual had no prior sales & marketing experience." He stated that he was under contract for the period July 1, 2001 through December 2002[1]. He worked primarily from his home by telephone with one trip to Jacksonville, Florida, for a meeting. He was paid a retainer of $10,000.00 per quarter for two quarters and $5,000.00 per quarter thereafter, and his work was limited to telephone consultation. The contract provided that GT was not to be entitled to any benefits from CSXT, and that he was to be reimbursed for expenses.

TO stated that he was retained by CSXT "to assist on an as-needed basis in the transition to a new management team in CSXT's Sales and [Marketing Department]." He stated that he contracted for the period November 20 through December 31, 2000. He worked in his home, primarily by telephone and e-mail. He was paid a single one-time payment for his services, specified in the contract as $27,000.06, plus travel expenses (to be incurred only with prior consent of CSXT).

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

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[1] According to GT, there were actually three contracts with various dates, including July 1, 2000 through June 30, 2001; July 1, 2001 through June 30, 2002; and July 1, 2002 through December 2002.

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

Both GT and TO were clearly not supervised in the performance of their services. In addition, they were not integrated into the staff of CSXT, and they were not providing services on the property of CSXT. Accordingly, a majority of the Board[2] finds that service of GT and TO for CSXT under the contracts described above constituted self-employment and not employee service.

Original signed by:

Michael S. Schwartz

Jerome F. Kever

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2 The Labor Member abstained.